IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1690 OF 2005.

Vasantkumar Jivrambhai Majithia,
Age: 45, residing at 1/2, Jain
Vidyapith Bhavan, Mahatma Gandhi
Road, Mulund (West), Mumbai 400080. .... Petitioner.

Versus.

1. State of Maharashtra
(At the instance of Special
Executive Magistrate, Mulund
Division, Mumbai.)

2. Laxman Narsaiyya,
Ravi Cable Network, Near
Gautam Nagar, Dumping Road,
Mumbai 400 080. .... Respondents.

Shri R.F.Lambay i/by M/s.Lambay & Co. for the
Petitioner.

Shri A.A.Kumbhakoni, Associate Advocate General with
Ms.M.H.Mhatre, A.P.P. for the Respondent No.1.

CORAM : ABHAY S. OKA, J.

(i) Date on which the
Judgment is reserved : 14th October, 2005.

(ii) Date on which the
Judgment is pronounced: 27th October, 2005.

JUDGMENT.

1. Rule. The learned A.P.P. waives service for the Respondent No.1. Service on Respondent No.2 is dispensed with. Taken up for hearing forthwith. I have

heard the learned Counsel for the Petitioner and the learned Associate Advocate General for the State.

2. The challenge in this petition under Article 227 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the said Code") is to the show cause notice dated 26th April 2005 issued by the Special Executive Magistrate, Mulund Division, Mulund, under section 111 of the said Code.

3. The learned Counsel for the Petitioner submitted that the notice under section 111 of the said Code is contrary to law. He pointed out that the notice recites that there was a dispute between the Petitioner and the witness No.1 over the business of cable network business. It is alleged that the Petitioner hurled abuses at the witness No.1 and therefore, a N.C. complaint has been registered against the Petitioner for commission of offence under sections 323 and 504 of the Indian Penal Code. It is alleged that on 26th April 2005 at about 9.45 a.m. the Petitioner threatened the witness No.1 and warned him to withdraw the N.C. complaint by warning him that in Mumbai number of accidents take place. By the said show-cause notice, the Petitioner was called upon to show-cause as to why

he should not be directed to furnish a bond for good behaviour for one year with one surety in the sum of Rs.5000/- of a respectable person. The Petitioner was called upon to remain present on 10th May 2005 in the office of the Special Executive Magistrate. It is alleged that on 10th May 2005, when the Petitioner met Assistant Police Inspector Shri Rapade, who asked the Petitioner whether he was willing to settle the dispute by paying cash or whether he was willing to provide a cable line connection. It is alleged that it is the said Shri Rapade who served show cause notice on the Petitioner. On 10th May 2005, the Petitioner narrated all this to the Assistant Commissioner of Police, under whose signature the notice was issued. Thereafter API Shri Rapade and a Constable Shri Sapkal started demanding money for themselves. On the next date fixed i.e. on 14th June 2005, the Petitioner attended the office of the Special Executive Magistrate along with his Advocate. His Advocate submitted an application on that day with a prayer to furnish copies of the complaint lodged with the Police Station to enable the Petitioner to submit a reply. An adjournment was sought for a period of one month. The allegation in the petition is that the Application made by the Advocate was not accepted and the Petitioner was forced to execute a bond.

4. When this petition came up before this Court on the earlier date, the learned A.P.P. produced a copy of the order dated 14th June 2005 passed by the Special Executive Magistrate under section 107 of the said Code directing the Petitioner to furnish a bond in the sum of Rs.5000/-. Therefore, the Petitioner was permitted to amend the said petition for challenging the said order. Accordingly amendment was carried out for incorporating the challenge to the said order.

5. On 6th September 2005, this Court passed the following order:

> "1. My attention has been invited by the learned A.P.P. to circular dated 3rd September, 2005 issued by the Home Ministry. A copy of the circular is taken on record. The learned Counsel for the Petitioner has placed on record a copy of the decision of the Division Bench of this Court reported in 2001 ALL M.R.(Cri.) page 2079 (Surendra s/o.Ramchandra Taori v/s. State of Maharashtra & ors.). In paragraph 19 thereof, this Court observed that vesting of powers of Special Executive Magistrates in

Police Officers of whatever rank has resulted in blatant misuse of the said powers to the detriment of the Fundamental Rights of the citizens as enshrined in the Article 21 of the Constitution of India.

2. The Division Bench has recommended that the State should take recourse to the Section 478 of the Code of Criminal Procedure, 1973 by vesting the powers of Special Executive Magistrate in the Judicial Magistrate, First Class or the Metropolitan Magistrate.

3. The learned A.P.P. seeks time to take instructions as regards the aforesaid aspect. Stand over for two weeks for further orders."

On the last date the learned Associate Advocate General produced copies of the Circulars dated 3rd September 2005 and 28th April 2003. The learned Associate Advocate General also produced a copy of the affidavit filed on behalf of the State Government in Criminal Writ Petition No.173 of 2002 filed in the Nagpur Bench of this Court as well as the order passed by the Bench at Nagpur in the said case.

6. The learned Counsel for the Petitioner submitted that the Special Executive Magistrate did not follow the procedure prescribed by the said Code and on 14th June 2005 without giving any opportunity of being heard to the Petitioner forced the Petitioner to execute a bond. He submitted that the State Government has refused to abide by the directions given by this Court in the said decision reported in 2001 All M.R.(Cri.) page 2079 (Surendra s/o.Ramchandra Taori v/s. State of Maharashtra & ors.). He submitted that the Division Bench of this Court recommended that the State Government should consider of exercising powers under section 478 of the said Code by vesting the powers of the Executive Magistrates in the Judicial Magistrate First Class or the Metropolitan Magistrate. He pointed out the roznama of the proceedings and stated that the case has been conducted in a high handed manner contrary to the procedure prescribed by the said Code. He pointed out that the order dated 14th June 2005 is a cyclostyled order and it shows non application of mind inasmuch as the said order records that the Petitioner accepted the allegations made against him and tendered apology. He pointed out that the Petitioner never accepted the allegations and never tendered apology.

7. The learned Associate Advocate General has

fairly argued the matter and has assisted this Court. He has placed reliance on the Circulars dated 28th April 2003 and 3rd September 2005 issued by the Home Ministry for the guidance of the Special Executive Magistrates. He pointed out that the Circular dated 3rd September 2005 has been issued after the procedural lapses on the part of the Special Executive Magistrate in this case were brought to the notice of the State Government. He submitted that for the reasons which are recorded in the affidavit filed in Writ Petition No.173 of 2002, the State Government has expressed inability to accept the recommendations made by the Division Bench of this Court in the Surendra's case (supra). He submitted that the State Government has made in-depth consideration of the recommendation of this Court.

8. I have considered the submissions. With a view to decide the controversy involved in this petition, it will be necessary to refer to the provisions of section 107 which reads thus:

> "107. Security for keeping the peace in other cases. - (1) When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act

that may probably occasion a breach of the peace or disturb the public tranquillity and is of opinion that there is sufficient ground for proceeding, he may in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with or without sureties for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.

. (2) Proceeding under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction."

Sections 111 to 116 are also relevant for the purpose of this petition, which read as under:

"111. Order to be made. - When a Magistrate acting under section 107, section 108, section 109 or section 110, deems it necessary to

require any person to show cause under such section he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required."

"112. Procedure in respect of person present in Court. - If the person in respect of whom such order is made is present in Court, it shall be read over to him, or, if he so desires, the substance thereof shall be explained to him."

"113. Summons or warrant in case of person not so present. - If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is to bring him before the Court;

. Provided that whenever it appears to such Magistrate, upon the report of a police officer or upon other information (the substance of which report or information shall be recorded

by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest."

"114. Copy of order to accompany summons or warrant.- Every summons or warrant issued under section 113 shall be accompanied by a copy of the order made under section 111, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same."

"115. Power to dispense with personal attendance.- The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace or for good behaviour and may permit him to appear by a pleader."

"116. Inquiry as to truth of information.- (1) When an order under section 111 has been read or explained under section 112 to a person in

Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under section 113, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary."

. (2) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trial and recording evidence in summons-cases.

. (3) After the commencement, and before the completion, of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reason to be recorded in writing, direct the person in respect of whom the order under section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry and may

detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded:

. Provided that -

(a) no person against whom proceedings are not being taken over under section 108, section 109, or section 110 shall be directed to execute a bond for maintaining good behaviour.

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 111.

(4). For the purposes of this section the fact that a person is a habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community

may be provided by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt within the same or separate inquiries as the Magistrate shall think just.

(6) The inquiry under this section shall be completed within a period of six months from the date of its commencement, and if such inquiry is not so completed, the proceedings under this Chapter shall, on the expiry of the said period, stand terminated unless, for special reasons to be recorded in writing, the Magistrate otherwise directs:

. Provided that where any person has been kept in detention pending such inquiry, the proceeding against that person, unless terminated earlier, shall stand terminated on the expiry of a period of six months of such detention.

(7). Where any direction is made under sub-section (6) permitting the continuance of proceedings, the Sessions Judge may, on an

application made to him by the aggrieved party, vacate such direction if he is satisfied that it was not based on any special reason or was perverse."

9. The power under section 107 can be exercised when the Special Executive Magistrate receives an information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of peace or disturb the public tranquillity. The said section further provides that if the Executive Magistrate is of the opinion that there is sufficient ground for proceeding, he may in the manner provided in the Code require such person to show cause why he should not be ordered to execute a bond (with or without sureties) for keeping peace for such period, not exceeding one year, as the Magistrate deems fit. Section 111 of the said Code mandates that when a Magistrate acting under section 107 deems it necessary to require any person to show cause, he shall make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force. Section 113 provides that if such person to whom notice is intended to be issued is not present in Court, the

Magistrate shall issue a summons requiring him to appear. In exceptional circumstances, the said section gives powers to the learned Magistrate to issue warrant of arrest. Section 114 mandates that every summons issued under section 113 shall be accompanied by a copy of the order made under section 111 and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with or arrested under the same. Section 116 lays down the procedure for holding the inquiry. Under section 116, the Executive Magistrate is under an obligation to make enquiry into the truth of the information upon which action has been taken and for that purpose he has to take such further evidence as may be necessary. Sub-section (2) of section 116 mandates that such an enquiry shall be made as nearly as may be practicable in the manner prescribed for conducting the trial and recording evidence in summons cases. Sub-section (3) provides that if the Magistrate considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, he may after commencement but before completion of the enquiry, for reasons to be recorded in writing direct the person in respect of whom the order under section 111 has been made to execute a bond with or without surety for

keeping peace or maintaining good behaviour until conclusion of the inquiry and may detain him in custody until such bond is executed or in default of execution,

until the inquiry is concluded.

10. In the present case a perusal of the case file which was produced before this Court shows that a copy of the order passed under section 111 was not forwarded with the summons issued to the Petitioner under section 113 of the said Code. In fact the Roznama of the proceedings does not record that a separate order as contemplated by section 111 is passed setting forth the substance of the information received. The roznama of the proceedings records that on 10th May 2005, the Petitioner remained present and he submitted a reply to the show-cause notice. Roznama dated 18th May 2005 records that witness No.1 was present and he was heard. On that day the Petitioner sought time. The next date was fixed as 26th May 2005 on which adjournment was granted to the Petitioner. On the next day, the hearing could not take place as the concerned Officer was not available. Roznama dated 7th June 2005 records that after commencement of the proceedings, there are complaints filed against each other by the Petitioner and the witness No.1. The case was adjourned to 14th June 2005. Roznama dated 14th June 2005 records what

transpired on that day. The English translation thereof is as under:

> "Opponent present for hearing.
>
> Witness No.1 present for hearing.
>
> Enquiry was made with the opponent herein whether he was prepared to execute a bond, the opponent made a request to accept personal bond. Therefore, the request of the opponent was accepted.
>
> The contents of the show-cause notice were read over and explained to the Opponent. A personal bond for maintaining peace and keeping good behaviour in the sum of Rs.5,000/- for a period of one year was obtained in writing from the Opponent and the matter was disposed of."

The order passed on 14th June 2005 appears to be in a printed or cyclolstyled form. The printed portion of the order records that the Petitioner accepted the

allegations made against him and has prayed for acceptance of apology. The printed portion of the order further records that on the basis of the evidence produced by the Senior Inspector of Police, Mulund Police Station, the Special Executive Magistrate has come to the conclusion that the Petitioner was having criminal tendancies and from the Petitioner there was a likelihood of breach of peace and tranquillity in the area and therefore, the order was passed directing him to furnish bond. In the printed format of order, only the name of the Petitioner, his address and the bond amount has been filled in by hand. It is pertinent to note that the Roznama dated 14th June 2005 does not record that the Petitioner accepted the correctness of the allegations made against him and tendered apology. What is recorded in the Roznama is that the Special Executive Magistrate asked the Petitioner whether he was willing to furnish a bond and the Petitioner requested that he may be allowed to furnish a personal bond. There is no reference to any separate order passed by the Executive Magistrate on 14th June 2005. There is no reference in the Roznama to evidence produced by the Senior Inspector of Police. After perusing the file, I found that no such evidence by the Senior Inspector of Police is on record. Thus the order dated 14th June 2005 shows a complete non-application of mind. Though

there is nothing on record to show that the Petitioner accepted the allegations made against him and tendered an apology, the order records the acceptance of allegations by the Petitioner and apology.

11. Going by the Roznama of the proceedings, it appears that a reply was filed by the Petitioner on the earlier date. The provisions of section 116 of the said Code mandate that as far as possible, the procedure for summons case shall be adopted in conducting the inquiry. Section 251 of the said Code which deals with the procedure of summons case provides that the particulars of the offence alleged against the Accused shall be stated to him and shall be asked whether he pleads guilty or has any defence to make. Section 252 further provides that if the accused pleads guilty, the Magistrate is required to record his plea. The Roznama records that the Special Executive Magistrate asked the Petitioner whether he was willing to furnish bond. The Petitioner had filed a reply contesting the show-cause notice and therefore, there was no occasion for the learned Magistrate to ask the question which is recorded in the Roznama. When the Petitioner had filed a reply to the show-cause notice, it is very difficult to accept that the Petitioner made a prayer for seeking permission to give personal bond. It is pertinent to note that the

Roznama does not record that the Petitioner pleaded guilty or that he tendered apology. As stated earlier, it is impossible to accept that the Petitioner voluntarily offered to give personal bond. As the Petitioner did not accept the allegations made against him in the show-cause notice and even assuming that interim order as contemplated by sub-section (3) of section 116 of the said Code was required to be passed, the learned Magistrate was bound to record reasons in writing. In the present case, the order dated 14th June 2005 is the final order which proceeds on an erroneous assumption that the Petitioner accepted the correctness of the allegations made against him and tendered apology. The order is erroneous for the reason that it relies upon the non-existing evidence allegedly produced by the Senior Inspector of Police. There is complete non-application of mind on the part of the officer concerned. It is obvious that the procedure which is followed by him is unjust, unfair and contrary to law.

12. It will be necessary to refer to the decision of the learned Single Judge of this Court reported in 1993 Mah.L.J. page 1409 (Christalin Costa (Smt.) and others v/s.State of Goa and others). In paragraph 7 this Court observed thus:

"7. In my view all these submissions of Shri Nadkarni seems to be sound and deserve acceptance. As far as the last grievance is concerned a bare perusal of section 107 of Criminal Procedure Code read with section 111 shows that such proceedings are to be instituted only in respect of information received by the Magistrate if he is satisfied that there is any danger or likelihood of somebody committing breach of the peace and disturbing public tranquillity. **Obviously when there are quarrels between two private individuals it appears that this situation is not contemplated by these legal provisions. Quarrels between individuals are not normally creating any problem of public order and at the most it may lead to a problem of law and order to be dealt with by the appropriate penal law. Proceedings under section 107 are always dealing with preventive measures to be taken by the Magistrates in order to pre-empt any possibility of breach of peace and disturbance of public tranquillity.** In the case of Jayant D.Shah and 4 others vs. State of Maharashtra, 1986(1) Crimes 305, this Court has held that the provisions of

> sections 107 to 110 cannot be used or exercised for satisfying private vendetta of a querulous person and the exercise of powers by the Magistrate under the aforesaid sections on the basis of incidents involving trivial quarrels without application of mind would amount to gross abuse of the process of law." (Emphasis supplied).

In paragraph 8 the learned Single Judge after considering the provisions of sections 107 and 111 of the Code proceeded to hold thus:

> "8. .....The harmonious construction of these two provisions clearly suggests that no order requiring any person against whom proceedings under section 107 of Criminal Procedure Code have been instituted can be passed by the Magistrate to execute a bond for maintaining peace unless a notice is issued to him to show cause as to why he should not be ordered to execute such a bond and **this notice is to be given to him only after an order in writing is made by the Magistrate setting forth the substance of the information and among others details of the bond to be executed by the said person.** It

follows therefore that the Magistrate is expected to apply his mind on the material placed before him by the police along with his report and on giving an opportunity to the opposite party to have a say on the question of executing a bond issue appropriate orders in this respect. The execution of the bond appears therefore to be an independent facet of the inquiry which the Magistrate is entitled to hold on the basis of the report forwarded to him by the police. Such inquiry as to the truth of the information forwarded to him in the report by the police is contemplated in section 116 of Criminal Procedure Code. It is true that its sub-section (3) provides that the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may direct the person against whom proceedings have been instituted under section 107 and an order under section 111 has been made to execute a bond. But this power of the Magistrate can be exercised by him only after the

commencement and before the completion of the inquiry." (Emphasis supplied).

13. In the present case the show-cause notice issued under section 111 and the order dated 14th June 2005 are required to be quashed and set aside only on the ground that there is no separate order passed by the learned Magistrate as contemplated by section 111 of the said Code. Passing of such an order is a condition precedent for initiating proceedings. Apart from this ground, there is a complete non-application of mind and the procedure followed by the learned Executive Magistrate is contrary to law. At this stage it will be necessary to refer to the circular dated 28th April 2003 issued by the Home Ministry. Certain guide-lines have been issued by the Home Ministry to the Special Executive Magistrates. In Circular dated 3rd September 2005, the State Government has directed that the cyclostyled orders under section 107 should not be issued and the order should not be passed without recording reasons as the order are quashed generally on these grounds.

14. Reliance is placed by the learned Counsel for the Petitioner on the recommendation of this Court made in the case of Surendra Taori (supra). In paragraph 19 of the said Judgment, the Division Bench of this Court

observed thus:

> "19. .....Therefore, in our humble opinion, it is high time that the State, which is duty bound to protect the fundamental right of its citizen and particularly relating to their liberty, should resort to section 478 of the Code of Criminal Procedure which vests in the State powers to order functions allocated to Executive Magistrates and such powers vested in favour of police officers as Special Executive Magistrate particularly in reference to Chapter VIII proceedings as they are commonly known and relate to Section 108 to 110 as well as section 145 and 147 of the Criminal Procedure code to be made over to Judicial Magistrate of the First Class or Metropolitan Magistrate, as the case may be."

My attention has been invited to the reply filed by the State in Criminal Writ Petition No.173 of 2002 before the Nagpur Bench of this Court. In the said reply reasons have been given by the State for not accepting the recommendations of the Division Bench. In the said affidavit, it is stated thus:

> "7. I respectfully say and submit that

> the Government has given anxious consideration to the observations made by this Hon'ble Court. Considering the present scenario and the law and order situation, the State Government is of the opinion that it may not be advisable to revert back to pre-1980 position and entrust this power to the Judicial Magistrates or Metropolitan Magistrates as observed by this Hon'ble Court. In my respectful submission, therefore, it is not necessary to withdraw the functions allotted to the Executive Magistrates relating to scrutiny for keeping peace and for good behaviour provided under Chapter VIII and maintenance of public order and tranquillity provided under Chapter X of the Code of Criminal Procedure."

In my view no grievance can be made by the Petitioner as regards failure of the State to accept the recommendation of this Court.

15. Hence the petition succeeds. The State Government is expected to issue necessary direction to ensure that the provisions of the said Code are scrupulously followed and complied with by the Special

Executive Magistrates. Hence the following order is passed:

i) The impugned order dated 14th June 2005 is quashed and set aside and the proceedings initiated on the basis of the impugned show cause notice are quashed.

ii) The Principal Secretary to the Home Department, State of Maharashtra, is directed to circulate a copy of this Judgment to all the Special Executive Magistrates to ensure that the proceedings under Chapter VIII of the Code are conducted strictly in accordance with law.

iii) The parties to act on an authenticated copy of this order.

Judge.